

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL A. ZIOMBER and U.S. POSTAL SERVICE,
POST OFFICE, Flushing, NY

*Docket No. 01-1735; Submitted on the Record;
Issued February 7, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant's request for reconsideration was untimely filed and failed to present clear evidence of error.

The Board has duly reviewed the case record and finds that the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was untimely filed and failed to present clear evidence of error.

The only decision before the Board on this appeal is the Office's March 8, 2001 decision, denying appellant's request for a review on the merits of its August 25, 1998 decision, the last merit review of record.¹ Because more than one year has elapsed between the issuance of the Office's August 25, 1998 decision, the last merit review of record and June 6, 2001, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the Office's August 25, 1998 decision and other prior decisions.²

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). The Office will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.³ When an application for review is untimely, the Office undertakes a limited

¹ Following the August 25, 1998 denial of modification, the Office issued a nonmerit decision dated October 5, 1999 denying appellant's request for reconsideration. Appellant's subsequent appeal to the Board was dismissed October 30, 2000 on appellant's request that the appeal be withdrawn so that he could utilize the reconsideration process. Docket No. 00-1059 (issued October 30, 2000).

² See 20 C.F.R. § 501.3(d)(2).

³ 20 C.F.R. § 10.607(a) (1999).

review to determine whether the application present clear evidence of error that the Office's final merit decision was in error.⁴

In this case, the Office accepted the conditions of lumbosacral strain and contusion for a work injury of December 28, 1990. After a series of work attempts, appellant was placed on the periodic rolls. By decision dated December 29, 1992, the Office terminated appellant's entitlement to compensation benefits on the grounds that he refused a suitable job offer. Appellant filed numerous requests for reconsideration which the Office denied. In his recent request for reconsideration dated September 28, 2000, appellant stated that the employing establishment granted him disability retirement effective July 9, 1991. Appellant also contended that he was totally disabled for all work as the Office had placed him on the periodic compensation payment rolls. Appellant presented further arguments regarding the report of Dr. Irving Mauer whom the Office found represented the weight of the medical evidence on file. Appellant submitted a U.S. Office of Personnel Management publication "Your Federal Retirement Benefits"; memorandum for the district medical adviser dated April 21, 1992; statement of accepted facts dated April 21, 1992; copies of the Office's letters dated April 21 and November 17, 1992; a partial copy of a May 28, 1992 medical report from Dr. Mauer; copies of undated letters to Dr. Mauer and appellant from the Office regarding the referee examination scheduled for May 21, 1992; a June 14, 1991 letter from the employing establishment to appellant regarding referral for a second opinion evaluation; an undated report and a December 6, 2000 report from Dr. Salvatore Lenzo, an Office referral physician; a copy of an Employees' Compensation Appeals Board's decision; and partial copies of reports from Henry Ford Behavioral Services and Dr. Robert Lloyd Goldstein along with a March 24, 1997 report from Dr. Goldstein with a Mental Residual Functional Capacity Assessment of March 24, 1997 attached.

By decision dated March 8, 2001, the Office denied appellant's reconsideration request stating that the evidence was untimely and did not show clear evidence of error.

The Board finds that, since more than one year elapsed from the August 25, 1998 merit decision of the Office to appellant's September 28, 2000 reconsideration request, the request for reconsideration is untimely. The Board further finds that the evidence submitted by appellant in support of his reconsideration request does not raise a substantial question as to the correctness of the Office's August 25, 1998 merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim.

In his September 28, 2000 reconsideration request, appellant presented arguments. The Board finds that the contentions raised by appellant have no merit and do not present clear evidence of error. Appellant first contended that the employing establishment rescinded its job offer as he was granted retroactive entitlement to disability retirement benefits. In support of that statement, appellant submitted the Office of Personnel Management's publication "Your Federal Retirement Benefits." Disability retirement benefits are based-separate statutory factors such as

⁴ 20 C.F.R. § 10.607(b) (1999).

appellant's age and the totality of medical impairments.⁵ Moreover, this evidence does not establish that appellant's refusal to accept a suitable limited-duty job was acceptable. Moreover, the Office properly noted that, once appellant's compensation was terminated due to his refusal of a suitable job, the job no longer needs to be available.⁶

Appellant further argued that as he had been placed on the periodic rolls, he is totally disabled for all work. He also reiterated earlier arguments regarding whether the report of Dr. Mauer, the Office referral physician, was sufficient to carry the weight of the medical evidence that he could return to work. The record reflects that, although Dr. Mauer initially served the role as an impartial medical examiner, he was subsequently found to be a second opinion physician as he occasionally shared office space with an employing establishment fitness-for-duty physician. Subsequent applications for reconsideration reflect that the report of Dr. Mauer is sufficient to carry the weight of the medical evidence on file. Accordingly, appellant's arguments pertaining to Dr. Mauer's status are repetitious and duplicative.⁷ Similarly, as Dr. Goldstein's March 24, 1997 report was previously of record and had been previously considered, it too is repetitious and duplicative.⁸

The new evidence appellant submitted was a September 1, 1999 report from Henry Ford Behavioral Services which is not signed and, therefore, is incomplete. The report opines that all of appellant's reported emotional symptoms seem associated with his injury in 1990 and subsequent disability and related difficulties. This report, however, fails to adequately explain with medical rationale how appellant's emotional state is related to the residuals of the December 28, 1990 work injury and, therefore, is not probative.⁹

In his appeal request, appellant identified disagreement with the Office's prior decisions. His arguments, however, do not present clear evidence of error. Appellant has, therefore, not shown by the evidence and arguments submitted in support of his request for reconsideration that the Office clearly erred when it found that the termination of compensation benefits for refusal of suitable work was proper.

For these reasons, the Office acted within its discretion in refusing to reopen appellant's case for further review under 5 U.S.C. § 8128(a).

The decision of the Office of Workers' Compensation Programs dated March 8, 2001 is affirmed.

⁵ See *Daniel Deparini*, 44 ECAB 657 (1993). The Board noted in that case that different standards of medical proof are involved with different administrative agencies and the Social Security Act, for example, does not require that disability be employment related.

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.10 (December 1995).

⁷ *John E. Watson*, 44 ECAB 612, 614 (1993).

⁸ *Id.*

⁹ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

Dated, Washington, DC
February 7, 2002

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member